This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 3/13/05.

**STATE OF ILLINOIS**
**HUMAN RIGHTS COMMISSION**

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| **IN THE MATTER OF:** | ) | |
| | ) | |
| **MOHAMMED FASIHUDDIN,** | ) | |
| | ) | |
| **Complainant,** | ) | |
| | ) | **Charge No.: 2002CF2324** |
| **and** | ) | **EEOC No.: 21BA21768** |
| | ) | **ALS No.: 03-055** |
| **ARGENBRIGHT SECURITY, INC.,** | ) | |
| | ) | |
| **Respondent.** | ) | |

## RECOMMENDED ORDER AND DECISION

On or about March 28, 2002, Complainant, Mohammed Fasihuddin, filed a charge of discrimination with the Illinois Department of Human Rights (IDHR). That charge alleged that Respondent, Argenbright Security, Inc., discriminated against Complainant on the basis of a physical handicap when it discharged him.

Respondent failed to file a verified response to Complainant's charge, despite being reminded of that obligation on more than one occasion. As a result, the IDHR issued a Notice of Default against Respondent and filed a Petition for Default Order and Complaint for Damages with the Illinois Human Rights Commission. The Commission granted IDHR's petition, and the requested hearing on damages was held on April 13, 2004.

Both parties appeared and participated in the damages hearing. Subsequently, the parties filed posthearing and reply briefs. The matter is ready for decision.

### FINDINGS OF FACT

The following facts were derived from the record file in this case and from the evidence presented at the damages hearing.

1. Complainant, Mohammed Fasihuddin, began working for Respondent, Argenbright Security, Inc., on October 8, 2000. Complainant worked as a Security Officer.

2. Respondent discharged Complainant effective February 25, 2002.

3. Complainant's last pay stub from Respondent indicates that he was paid three separate "regular" hourly rates: $8.00 per hour, $10.00 per hour, and $12.00 per hour.

4. Most of Complainant's pay stubs from Respondent indicate at least two different "regular" hourly rates. The last pay stub is the only stub that indicates the $12.00 per hour rate. The $12.00 per hour rate applied to only 5.25 hours of the 78.25 hours covered on the last pay stub.

5. When he worked for Respondent, Complainant's hours varied from week to week.

6. Complainant was paid time and a half for overtime work.

7. On average, in his last eight full paychecks with Respondent, each check covering two weeks' work, Complainant was paid $986.35.

8. Complainant was unemployed for 31 weeks after his discharge from Respondent.

9. Complainant worked for Safety Security Company from October 5, 2002 until June 14, 2003. He was paid $7.25 per hour in that job. His total pay from that job was $10,541.51.

10. On or about June 7, 2003, Complainant began working for Guardsmark Security Company. He still holds that position. His pay at Guardsmark was $10.30 per hour. He receives time and a half for overtime.

11. On average, in his first eight full paychecks from Guardsmark, each check covering two weeks' work, Complainant was paid $1,024.06.

12. The emotional distress suffered by Complainant after his discharge was not significantly greater than the distress suffered by most people who have been unjustly discharged.

13. Complainant is seeking compensation for the work of his attorneys at the rate of $375.00 per hour for 33.35 hours.

14. The requested hourly rate is reasonable under the circumstances and should be accepted. The requested number of hours should be reduced by one-half hour.

## CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. As a result of the default entered against Respondent, there are no liability issues to address.

4. Because of its failure to file an objection to Complainant's request for attorney's fees, Respondent has waived its right to object to such fees.

## DISCUSSION

On January 14, 2004, a panel of the Human Rights Commission entered an order of default against Respondent, Argenbright Security, Inc. As a result of that order, there are no liability issues to address. Only damages issues remain to be determined.

Before reaching the merits of those issues, there are two evidentiary matters to resolve. First, at the damages hearing in this matter, Respondent asked that the Commission take official notice of some documents obtained from the web site of the federal Transportation Security Administration. Complainant objected to Respondent's request. The ruling at the time was that the parties could brief the issue of official notice and a ruling would come as part of this Recommended Order and Decision. Upon review of the dispute, it appears that it would be appropriate to take official notice of the documents in question. Accordingly, those documents were reviewed as part of the evaluation of the record in this matter.

Next, without first asking for leave, Respondent attached a document as an exhibit to its initial posthearing brief. That document apparently was intended as evidence in this case. Such a method of submitting evidence is highly improper. Both parties were given notice of the date and time of the public hearing in this matter. Both parties were given the opportunity to present evidence at that hearing. Once that hearing was closed, Respondent lost the right to submit further evidence. As a result, the exhibit attached to Respondent's posthearing brief was not considered during the evaluation of the record in this matter.

With those evidentiary issues resolved, it is possible to consider what the evidence proves. Unfortunately for Respondent, the documents it submitted do not prove the proposition Respondent sought to establish. At most, the documents prove that the federal government took over airport security and that Respondent lost its contract to provide such security. They do not demonstrate that Respondent stopped its operations in Illinois. Respondent's posthearing briefing repeatedly asserts that the company ceased operations, but there literally is no evidence in the record to establish that proposition. The arguments of counsel are not evidence.

The only evidence addressing Respondent's continuing operation came from Complainant, who testified that he sought a job with Respondent after his discharge. He testified that he was told that he was denied a job because he had filed a lawsuit (this action) against the company. That explanation is hardly supportive of a claim that the company had stopped doing business. Thus, this Recommended Order and Decision contains no finding that Respondent has ceased operations in Illinois or even that reinstatement is not a possibility.

A prevailing complainant is presumptively entitled to reinstatement to a job lost to unlawful discrimination, and there is no evidence in the hearing record to establish that reinstatement is not an appropriate remedy in this case. Accordingly, it is recommended that Respondent reinstate Complainant to his former position or to a substantially equivalent

position. His pay and benefits should be the same as they would have been if he had never left Respondent's employ.

Complainant also is entitled to an award of backpay, but the parties strongly disagree about the appropriate size of that award. In fact, the parties disagree about virtually every aspect of the backpay issue, including the appropriate hourly rate of pay, the appropriate cut-off date, and tax treatment.

The tax issue is the easiest question to resolve. Respondent argues that Complainant should only be awarded the pay he would have received after taxes, but the company offers no useful case law in support of that position. The cases Respondent cites have no relevance to actions brought under the Human Rights Act and are completely unpersuasive in this setting. The Human Rights Commission has routinely calculated backpay awards on the basis of the prevailing complainant's gross pay. Respondent's suggested pay scheme would shortchange Complainant because any backpay award he receives will be subject to income taxes in the year he receives it. In other words, if Respondent's argument is accepted, Complainant effectively will be taxed twice on his award. Such an outcome would be unfair and should be rejected out of hand.

Things are less clear with regard to the appropriate hourly rate of pay. Complainant maintains that he was earning $12.00 per hour when he was discharged. He argues that the calculation of his backpay award should begin by using that rate. In his reply brief, Complainant states that "it was uncontradicted" that he made $12.00 per hour at the time of his termination. The record, though, is not all that clear on that point.

It is true that Complainant testified to the $12.00 per hour rate. However, the documentary evidence provides something of a contrast. His last pay stub from Respondent indicates that he was paid three separate "regular" hourly rates: $8.00 per hour, $10.00 per hour, and $12.00 per hour. In fact, most of Complainant's pay stubs from Respondent indicate

at least two different "regular" hourly rates. The last pay stub is the only stub that indicates the $12.00 per hour rate, and that rate applied to only 5.25 hours of the 78.25 hours covered on that stub.

Complainant made no attempt to explain that variety of "regular" hourly rates. Clearly, he had a desire to have his backpay award calculated exclusively on the $12.00 rate. Just as clearly, though, such a calculation would be unfair. Without an explanation of the varying "regular" hourly rates, there is very little credibility to Complainant's testimony that his pay was $12.00 per hour. After all, that rate applied to only about 6.7% of one paycheck during his tenure with Respondent.

Moreover, there was considerable variance in the number of hours Complainant worked during each pay period. His pay stubs for the last eight pay periods (not counting the last stub, which apparently applied to an incomplete pay period) indicate payment for as few as 89.50 hours and as many as 105.25 hours. Considering that the number of hours directly affects the amount of overtime payment, that variation in hours has the potential to confuse backpay calculations.

To try to balance out some of the uneven effects of the overtime and the varying pay rates, it is recommended that Complainant's backpay be calculated on the basis of an average of his paychecks over his last several months. His last eight full paychecks (again, not counting the partial last check) averaged $986.35. That amounts to $493.18 per week, which is the recommended basis for the backpay award.

It should be noted that the recommended rate works out to $10.16 per hour, a figure that includes the effect of overtime pay. Complainant's last check, which included the disputed $12.00 "regular" rate, works out to only $10.05 per hour. Admittedly, that last check appears to have been for a partial pay period. Nonetheless, given the limited time for the $12.00 rate and the unpredictability of overtime, it is not clear that eliminating the last check from the calculation

works significantly to Complainant's disadvantage.

Complainant argues that he is still earning less than he would have earned had he remained with Respondent, but that argument is not borne out by the record. For one thing, Complainant bases his calculations entirely on the $12.00 per hour rate, a rate that should not be used. Moreover, Complainant assumes a 5% annual raise, an assumption that is based upon speculation. There is no evidence that anyone working for Respondent received a raise after the time of Complainant's discharge.

Backpay liability continued to run until Complainant found a job that paid more than his job with Respondent. *See* ***Martin and Sangamon State University***, 48 Ill. HRC Rep. 59 (1989), *rev'd on other grounds sub nom* ***Board of Regents for Regency Universities v. Illinois Human Rights Commission***, 196 Ill. App. 3d 187, 552 N.E.2d 1373 (4th Dist. 1990). Complainant reached that point when he started his job with Guardsmark Security Company. Complainant was paid $10.30 per hour at Guardsmark, with time and a half for overtime. In his first eight full paychecks, he received gross pay of $1,024.06 per check, or $512.03 per week, slightly more than he earned with Respondent. As with Complainant's pay during his tenure with Respondent, about four months' worth of payments were averaged, to reduce the effects of varying hours and overtime amounts. His first Guardsmark paycheck was not included in the averages because Complainant did not start work at the beginning of the pay period. Thus, that first check did not include the full effects of overtime payments.

Complainant's first full pay period with Guardsmark began on June 8, 2003. That was approximately 67 weeks after February 25, 2002, the effective date of his discharge. Had he remained with Respondent during that period, he would have earned $33,043.06. That is the gross backpay figure. From that amount, it is necessary to subtract his actual earnings. Complainant worked for Safety Security Company from October 5, 2002 until June 14, 2003. He was paid $7.25 per hour in that job. His total pay from that job was $10,541.51. In addition,

Complainant earned $320.00 from his first paycheck with Guardsmark. (As noted above, during that period, Complainant's checks did not reflect the effects of overtime pay. As a result, during that period, he was not really earning as much as he had during his time with Respondent. However, the amount he earned there must still be deducted from the backpay award.) Subtracting those amounts from the gross backpay figure leaves $22,181.55. That is the amount of the recommended backpay award.

Because of the delay in the backpay owed to him, prejudgment interest is necessary to make Complainant whole. Such interest is recommended.

Complainant also has requested an award of damages for the emotional distress he endured as a result of his discharge. That request should be denied. The Human Rights Commission presumes that recovery of pecuniary losses generally is enough to compensate a prevailing complainant for any emotional distress. *See* ***Smith and Cook County Sheriff's Office***, 19 Ill. HRC Rep. 131 (1985). Complainant did not provide enough evidence to find that his emotional distress was significantly more intense than what is normally experienced by someone who is denied employment because of unlawful discrimination.

Complainant testified that he has increased his medication since his discharge, but that testimony is not convincing. For one thing, there was no medical testimony to tie the medication to an increase in stress. Moreover, according to his charge, Complainant was discharged because he had a diabetic reaction at work. His medication was changed beginning the very next day. It is far more likely that the change in medication was related to the diabetic reaction than to the stress of his discharge.

Complainant's testimony about recent chest pain was no more convincing. Again, there was no medical testimony to make the connection to the discharge. In the absence of such evidence, concluding that recent pain is related to a two year old incident stretches the bounds of permissible inference.

Complainant's testimony about borrowing money and being unable to make purchases simply mirrors the experience of the vast majority of people who are suddenly and unjustly discharged. Such experiences are not sufficient to overcome the Commission's presumption that recovery of pecuniary damages will compensate a complainant for the emotional distress of a civil rights violation.

Even though Complainant did not specifically request them at the damages hearing, there are two other types of relief that are appropriate in this situation. Respondent should be ordered to clear Complainant's personnel records of any reference to this action or to the underlying charge. In addition, Respondent should be ordered to cease and desist from further unlawful discrimination on the basis of physical handicap.

Finally, Complainant is entitled to an award of attorney's fees. The starting point for analysis of a motion for attorney's fees is the case of ***Clark and Champaign National Bank***, 4 Ill. HRC Rep. 193 (1982). Under ***Clark***, Complainant must first establish that the hourly rate he seeks is appropriate. Then, he must establish the number of hours reasonably expended on the case.

Complainant's motion for fees was combined with his post-hearing briefing. Although Respondent filed its own posthearing briefs, those briefs did not address the issue of attorney's fees. By failing to address the issue of fees, Respondent has waived the issue of such fees. *See* ***Mazzamuro and Titan Security, Ltd.***, ___ Ill. HRC Rep. ___, (1989CN3464, October 21, 1991).

Even without that waiver, it would be recommended that Complainant be awarded the vast majority of the attorney's fees he seeks. Complainant is seeking compensation for the work of his attorneys at the rate of $375.00 per hour for 33.35 hours. The hourly rate is steep by the standards of this forum, but it does not appear to be particularly steep by the standards of the local market.

Complainant submitted an affidavit from attorney Lonny Ben Ogus that states that Mr. Ogus's current rate charged to new clients is $400.00 per hour. An affidavit from Complainant's other attorney, Carl Walsh, states that Mr. Walsh charges clients "not less than $375.00 per hour." Complainant also submitted an affidavit from attorney Terrance Coughlin, a former chairman of the Chicago Bar Association's Committee on Fees. Mr. Coughlin's affidavit states that the current market rate for attorneys with the skill and experience of Complainant's attorneys is "no less than $400.00 per hour." As a result, it is recommended that the requested hourly rate be accepted.

There are, however, two small cuts that should be made in the requested hours. Such cuts are appropriate, even in a waiver situation, when a fee petition requests payment for time which clearly is not compensable. *See* ***White and County of Winnebago/Animal Services Dep't***, ___ Ill. HRC Rep. ___, (1989CA0450, April 28, 1992).

A careful line-by-line review of the submitted time listings reveals two entries which are not compensable. On both April 1, 2004 and July 2, 2004 mention "filing" documents. Attorneys cannot be compensated for performing basic clerical tasks. ***Altes and Illinois Dep't of Employment Security***, 50 Ill. HRC Rep. 3 (1989). Since the time listings in question involve more than one activity, it is not entirely clear how much time was spent on filing. The July listing, though, is only .4 hour long, so the time spent on filing had to have been shorter than that. It is recommended that the listings in question be shortened .25 hour each, resulting in a total deduction of half an hour. After those deductions, the total recommended attorney's fees amount to $12,318.75.

## RECOMMENDATION

Based upon the foregoing, it is recommended that an order be entered awarding the following relief:

A. That Respondent reinstate Complainant to his former position, or to a substantially equivalent position, at the rate of pay, and with the benefits and seniority he would have had if he had not left Respondent's employ;

B. That Respondent pay to Complainant the sum of $22,181.55 for lost backpay;

C. That Respondent pay to Complainant prejudgment interest on the backpay award, such interest to be calculated as set forth in 56 Ill. Adm. Code, Section 5300.1145;

D. That Respondent pay to Complainant the sum of $12,318.75 for attorney's fees reasonably incurred in the prosecution of this matter;

E. That Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;

F. That Respondent cease and desist from further unlawful discrimination on the basis of physical handicap.

HUMAN RIGHTS COMMISSION

BY:_____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: October 12, 2004